

James M. Hanavan, State Bar No. 66097  
Kristen E. Drake, State Bar No. 202827  
CRAIGIE, McCARTHY & CLOW  
540 Pacific Avenue  
San Francisco, CA 94133  
Telephone: (415) 732-7788  
Facsimile: (415) 732-7783

Attorneys for Defendants  
SAFER TECHNOLOGIES, INC.,  
CERMA TECHNOLOGY, INC.,  
GEORGE ACKERSON, MARY STRANAHAN,  
NICHOLAS STREIT and EDWARD HALBACH

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

MOTOR WORKS LLC,

Plaintiff,

vs.

SAFER TECHNOLOGIES, INC., CERMA  
TECHNOLOGY, INC., GEORGE  
ACKERMAN, MARY STRANAHAN,  
NICHOLAS STREIT, TIM STREIT and  
EDWARD HALBACH,

Defendants.

Case No.: 08-CV-03608 JW

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANTS' MOTION FOR LEAVE  
TO FILE A MOTION FOR  
RECONSIDERATION OF THE COURT'S  
ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT**

**OR IN THE ALTERNATIVE  
DEFENDANTS' MOTION TO REOPEN  
DISCOVERY TO COMPEL RESPONSES  
TO DEFENDANTS' OUTSTANDING  
DISCOVERY AND COMPLETE THE  
DISCOVERY PROCESS**

Date: January 11, 2010  
Time: 9:00 a.m.  
Courtroom: 8, 4<sup>th</sup> Floor  
Judge: Hon. James Ware

///

///

///

///

**I. Defendants' Request For Leave to File a Motion for Reconsideration of the Court's Summary Judgment Order Is Based on the Fact that Plaintiff Motor Works is NOT The Manufacturer of the Product**

The Court's Summary Judgment Order identifies Plaintiff Motor Works as the *manufacturer* of the product at issue (Order, page 7, line 22) and heavily relies on a case between a manufacturer and a distributor. However, both Plaintiff and Defendants in this case are nonexclusive *distributors* of the engine additive product at issue, a chemical product named BYK-333. The *manufacturer* of the product is a German based company, ALTANA AG.

Thus, Defendants do not understand the Court's reliance on *Sengoku Works Ltd. v. RMC International, Ltd.*, 96 F.3d 1217 (9th Cir. 1996). This case was not cited by either party and involves a lawsuit by a product *manufacturer* against a product *distributor* for violation of an oral exclusive distribution agreement. Plaintiff Motor Works falsely alleges it is the manufacturer of BYK-333, basing its infringement and related claims on this falsehood. However, the undisputed facts establish that the statement is false, and further establish that the mark/name in dispute, CERMAX, is registered to Defendant Safer Technologies, Inc.

**II. Alternatively, Defendants Move to Reopen Discovery to Compel Discovery Responses to Outstanding Discovery and to Complete The Discovery Process**

In its summary judgment order, the Court held that it "construes plaintiff's Opposition as, in part, a motion for the Court to recognize plaintiff's July 6, 2009 answer to the interrogatories as responsive to defendants' requests for admissions." [Order, page 5, lines 15-16.] But, Plaintiff never responded in any way to Defendants' interrogatories. Instead, on July 6, 2009, it belatedly severed denials to all but one of Defendants' requests for admissions.

In the alternative, and pursuant to the Court's court (Order, page 5, lines 17-18), Defendants request that discovery be reopened so that Defendants can compel responses to their outstanding discovery and complete the discovery process. Defendants are unaware of any facts which would support Plaintiff's claims, but Plaintiff has failed and refused to respond to discovery. The discovery has been outstanding since June.

Significantly, defendant Safer, who acquired the "CERMAX" tradename from its registered owner Cerma Technology, Inc., has expended substantial money, time and effort

1 marketing BKY-333 to distributors throughout the United States under that name. Defendant  
2 Cerma Technology, Inc. spent some \$30,000 in conducting a tradename search and protecting the  
3 tradename and related mark from infringement by registration with the United States Patent  
4 Office.

5 The undisputed evidence supporting all of the foregoing facts is presently before this  
6 Court, and Plaintiff has offered nothing to meet the burden of proof which it has both under  
7 federal law and as the plaintiff asserting the pending claims. *Qualitex Co. v. Jacobson Products*  
8 *Co., Inc.* 13 F.3d 1297, 1301 (9th Cir. 1994); *Vuitton et Fils S.A. v. J. Motor Worksng*  
9 *Enterprises, Inc.*, 644 F.2d 769, 775 (9th Cir.1981). In the circumstances, Defendant Safer  
10 Technologies must proceed to trial to protect its federal registration, substantial investment and  
11 business reputation if Defendants' Summary Judgment Motion is not granted on a Motion for  
12 Reconsideration.

13  
14 Dated: December 7, 2009

CRAIGIE, MCCARTHY & CLOW

15  
16  
17 /s/ James M. Hanavan

18 By: James M. Hanavan  
19 Attorneys for Defendants  
20 SAFER TECHNOLOGIES, INC.,  
21 CERMA TECHNOLOGY, INC.,  
22 GEORGE ACKERSON,  
23 MARY STRANAHAN,  
24 NICHOLAS STREIT and  
25 EDWARD HALBACH  
26  
27  
28